

STATE OF MICHIGAN
COURT OF APPEALS

PM INNSBROOK, L.L.C., and RH INNSBROOK,
L.L.C.,

UNPUBLISHED
October 17, 2006

Plaintiffs-Appellants,

v

INNSBROOK ASSOCIATES LIMITED
PARTNERSHIP, INNSBROOK G.P., L.L.C., and
ROSS H. PARTRICH,

No. 268796
Wayne Circuit Court
LC No. 05-534292-CZ

Defendants-Appellees.

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants' motion for summary disposition, and dismissing plaintiffs' complaint with prejudice. After thoroughly considering all of plaintiffs' arguments, we affirm.

I. Facts and Proceedings

This case arises out of the purchase of an apartment complex pursuant to a purchase agreement. The agreement was executed by Paul Mashni, as purchaser, and defendant Innsbrook Associates Limited Partnership (hereafter "Innsbrook LP"), as seller, in March 2004. Defendant Ross H. Partrich signed the purchase agreement on behalf of Innsbrook LP as a member of Innsbrook LP's general partner, defendant Innsbrook G.P., L.L.C. As part of the purchase agreement, Innsbrook LP provided plaintiffs with a "rent roll" for the years 2001, 2002, 2003, and up to February 9, 2004. With regard to the rent roll, the purchase agreement provided that Innsbrook LP, made a number of representations in the purchase agreement that were made "to the best of its knowledge, [and] without any investigation or inquiry, as of the date hereof, the date of Closing and not to survive thereafter," including a representation in ¶ 6(B) that

[t]o the best of Seller's knowledge, the rent roll, the revenue and expense items identified on the Statement of Net Operating Income (pre-adjustment) for 2001, 2002 and 2003 and the Physical Occupancy Summary prepared as of February 9, 2004, all as attached hereto as Exhibit "D" are true, correct and genuine in all material respects.

As a condition precedent to Mashni's obligation to proceed with the transaction, Mashni was allowed a 45-day period to inspect the physical and economic condition of the premises and unilaterally rescind the transaction if unsatisfied with the inspection. Possession of the premises was to be delivered to Mashni at closing, subject only to the rights of tenants in possession according to a rent roll to be updated and provided by Innsbrook LP at closing. The original purchase price was \$17.5 million, but a First Amendment To Purchase Agreement (amendment) executed on March 25 and 26, 2004, reduced the price to \$16.8 million. In this amendment, Mashni also waived any continuation of the 45-day inspection period contingency and related right of unilateral rescission.

In November 2005, plaintiffs, PM Innsbrook, L.L.C., and RH Innsbrook, L.L.C., as alleged purchasers of the apartment complex,¹ filed this action against Innsbrook LP, Innsbrook G.P., L.L.C., and Partrich, seeking damages from each defendant on the ground that the purchase price for the apartment building was the product of fraudulent misrepresentations (Count I), innocent misrepresentations (Count II), and fraud (Count III). Plaintiffs filed a number of documents with their complaint, including the purchase agreement between Mashni and Innsbrook LP executed in March 2004, but did not include the amendment that reduced the purchase price from \$17.5 to \$16.8 million.

In lieu of answering the complaint, defendants jointly moved for summary disposition under MCR 2.116(C)(8), relying in part on the amendment to the purchase agreement. Plaintiffs submitted an affidavit in opposition to the motion in which Mashni averred that he would not have entered into the purchase agreement if the rent roll provided to him with the purchase agreement had not been certified as true and accurate. The trial court, upon considering the reduced purchase price, agreed with defendants' position and determined that no factual development could survive the motion for summary disposition. Accordingly, it granted the motion and dismissed the case.

II. Analysis

Before we address the merits of plaintiffs' appeal, we must determine our standard of review. The trial court granted defendants' motion under MCR 2.116(C)(8), but defendants had attached to the motion at least one document (the amendment) that was neither attached to nor incorporated into plaintiffs' complaint. Thus, because a motion under MCR 2.116(C)(8) is limited to the pleadings alone, *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), and because defendants submitted evidence beyond the pleadings in support of their motion, it was improper to consider defendants' motion under subrule (C)(8).

Instead, the motion should have been decided under MCR 2.116(C)(10). Although the trial court did not consider the motion under that rule, we will. See *Spiek v Dep't of Transportation*, 456 Mich 331, 338; 572 NW2d 201 (1998) (an appellate court may review a trial court's summary disposition ruling under the appropriate subrule). In our de novo review we

¹ Mashni apparently assigned his interest in the apartment complex to plaintiffs. The parties do not contest plaintiffs' standing to pursue this action.

consider the pleadings, affidavits, and other evidence presented to the trial court, to the extent the content or substance would be admissible as evidence, to determine if a genuine issue of material fact was established. MCR 2.116(C)(10); MCR 2.116(G)(6); *Maiden, supra* at 120. The fact that discovery was incomplete did not preclude granting the motion for summary disposition where further discovery did not stand a reasonable chance of uncovering factual support for plaintiffs' position. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 25; 672 NW2d 351 (2003).

In *M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998), we set forth the elements necessary to establish a claim for fraud and fraudulent misrepresentation (which are essentially one in the same claim)²:

As a general rule, actionable fraud consists of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [Citation omitted.]

The *McConkey* Court also described what is necessary for proving an innocent misrepresentation claim:

A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation. *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 118; 313 NW2d 77 (1981). The innocent misrepresentation rule represents a species of fraudulent misrepresentation but has, as its distinguished characteristics, the elimination of the need to prove a *fraudulent purpose* or an intent on the part of the defendant that the misrepresentation be acted upon by the plaintiff, and has, as added elements, the necessity that it be shown that an unintendedly false representation was made in connection with the making of a contract and that the injury suffered as a consequence of the misrepresentation inure to the benefit of the party making the misrepresentation. *Id.* at 118. Thus, the party alleging innocent misrepresentation is not required to prove that the party making the misrepresentation intended to deceive or that the other party knew the representation was false. *Id.* at 117. [*Id.* at 27-28 (citation omitted).]³

² See *Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004).

³ Interestingly, plaintiffs' brief on appeal does not address the elements of the torts alleged in its complaint.

Although the trial court's reason for granting summary disposition in favor of Innsbrook LP is somewhat unclear, we have no doubt that the court reached the right result. See *Glazer v Lamkin*, 201 Mich App 432, 437; 506 NW2d 570 (1993). Dispositive of this appeal is the absence of any material factual support for plaintiffs' position that Mashni reasonably relied on the rent roll to enter into the purchase agreement or its amendment. As noted above, reliance is an essential element of plaintiffs' causes of action, regardless of whether plaintiffs were pursuing a theory of fraudulent or innocent misrepresentation. See also *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976) (fraudulent misrepresentation), and *M & D, Inc v McConkey*, *supra* at 27-28 (1998) (innocent misrepresentation). Additionally, any reliance must be reasonable. *Foreman v Foreman*, 266 Mich App 132, 142; 701 NW2d 167 (2005).

Quite simply, plaintiffs failed to establish a genuine issue of material fact regarding whether Mashni reasonably relied on the February 27, 2004, rent roll supplied to him in March 2004, as an inducement for either entering into the purchase agreement or amending the purchase price in that agreement to \$16.8 million. It is apparent from ¶ 6(B) of the purchase agreement that Innsbrook LP gave Mashni notice that it did not investigate or inquire into the accuracy of the rent roll and would not do so. Further, the "as is" clause in ¶ 20 of the purchase agreement provided notice that Innsbrook LP refused to represent any income that might be derived from the rent roll or any other item. Paragraph 20 broadly provided:

Neither Seller nor its agents, contractors or representatives have made any representations, warranties, promises, covenants, agreements or guarantees of any kind or character whatsoever, whether express or implied, oral or written, past, present or future, of, as to, concerning or with respect to . . . (b) the income which may be deprived from the Subject Premises . . . or (e) any other matter with respect to the Subject Premises Purchaser acknowledges that it shall have an opportunity to inspect the Subject Premises and Purchaser agrees to take the Subject Premises on an "AS IS" basis.

Additionally, and in our view most importantly, the condition precedent⁴ to Mashni's performance established by the purchase agreement was the 45 days granted under ¶ 7(A) of the original purchase agreement to "inspect or cause to be inspected all aspects of the physical and economic condition of the Subject Premises in accordance with the terms and conditions of this Agreement," which Mashni waived as part of the amendment reducing the purchase price to \$16.8 million.

As we have previously held, "there can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of

⁴ A condition precedent is a condition that one party must meet before the other party is obligated to perform. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 411; 646 NW2d 170 (2002). It is a fact or event that the parties intend must take place before there is a right to performance. *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350; 605 NW2d 360 (1999).

their utilization has not been prohibited by the defendant.” *Webb v First of Michigan Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992). This rule properly applies where, as here, a plaintiff is presented with information and chooses to ignore it, or has some indication that further inquiry is needed. *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 501; 686 NW2d 770 (2004).

Because the terms of the purchase agreement should have alerted Mashni of the need to inspect the apartment complex’s financial condition as reflected in the documents supplied to him, including the February 27, 2004, rent roll, and because the agreement specifically gave Mashni an inspection right as a condition precedent to his performance, we conclude that plaintiffs’ claim fails as a matter of law, regardless of whether they are pursuing a claim for fraudulent or innocent misrepresentation. The documents themselves, agreed to by sophisticated parties of equal bargaining power, provided plaintiffs with the ability to inspect the rent rolls and supporting information, and to unilaterally rescind the deal, if at all unsatisfied with the inspection. Not only did plaintiffs not fully utilize this procedure, but also they waived the procedure less than a month after signing the agreement. Therefore, even while viewing the evidence in a light most favorable to plaintiffs, we affirm the trial court’s grant of summary disposition in favor of Innsbrook LP because, even assuming that Mashni relied on the February 27, 2004, rent roll and that it contained false representations of fact, it cannot be reasonably inferred that Mashni’s reliance was reasonable.⁵ *Webb, supra; The Mable Cleary Trust, supra.*⁶

Finally, we reject plaintiffs’ claim that the trial court abused its discretion by not allowing them to amend the complaint. Although the trial court did not articulate a conclusion that any amendment would be futile, it is apparent from the trial court’s reliance on the “factually driven” nature of defendants’ motion that it denied the request to amend based on futility. Under MCR 2.116(I)(5), “[i]f the grounds asserted are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified.” See also *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52-53; 684 NW2d 320 (2004). Because an amendment was not justified based on the evidence before the trial court, we affirm the trial court’s denial of

⁵ Plaintiffs’ issue concerning whether Innsbrook G.P., L.L.C., and Partrich are necessary parties to this action under MCR 2.205 is not properly before us because the trial court did not decide this issue. *Koster v June’s Trucking, Inc*, 244 Mich App 162, 168; 625 NW2d 82 (2000). In any event, because plaintiffs’ claims against each defendant are based on the same conduct, we find it unnecessary to consider this issue. Our holding with respect to Mashni’s lack of reasonable reliance applies equally to Innsbrook G.P., L.L.C., and Partrich, even assuming that they were proper parties.

⁶ Plaintiffs’ argument that the fraud occurred through the “certified” rent roll provided at closing is a red herring. The “certified” rent roll was for the same time period as contained in the February 2004 rent rolls provided to plaintiffs with the purchase agreement, save for the addition of a couple of months. Thus, had plaintiffs utilized the contractually provided inspection period to the fullest extent, it could have obtained all necessary information to determine the truthfulness of the later rent roll. *Webb, supra.*

plaintiffs' counsel's oral motion to amend the complaint to plead specific allegations. *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).⁷

Affirmed.

/s/ Christopher M. Murray

/s/ Michael R. Smolenski

⁷ In our view, discovery would not assist plaintiff in pursuing these claims. Indeed, this case is properly resolved as a matter of law because the documents are unambiguous, and the unambiguous terms require dismissal under the law regarding reasonable reliance. *Webb, supra*.